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The Baker McKenzie **International Arbitration Yearbook**

Thailand

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A. Legislation and rules

A.1 Legislation

International arbitration in Thailand is governed by the Act, to which no legislative amendment has been made since its enactment.

A.2 Institutions, rules and infrastructure

There are three arbitration institutions in Thailand: the Thai Commercial Arbitration Committee of the Board of Trade of Thailand (TCAC); the Thai Arbitration Institute (TAI); and the Thai Arbitration Center (THAC).

Other organizations active in the field of arbitration in Thailand include the Security and Exchange Commission, which established arbitration mechanisms in 2001 for claims arising under its own laws between securities companies and private clients, as well as the Department of Insurance, which established the Office of Arbitration in 1998 to handle arbitral proceedings relating to claims under insurance policies. Shortly thereafter, the Department of Insurance issued a regulation requiring all insurance companies to include an

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arbitration clause in their policies, a development that allows the beneficiaries of insurance policies to choose to process their claims through arbitration or in the court, at their discretion. In the event the beneficiary decides to refer its claim to arbitration, insurance companies are required to participate in the arbitral proceedings. These regulations have led to a significant filing of arbitration cases with the Department of Insurance.

A.2.1 TCAC

The TCAC has been one of the pioneers in the arbitration field in Thailand and is active in promoting arbitration in the business community. The committee revised its arbitration rules in 2003 to align them with the Act. Nevertheless, the TCAC is infrequently utilized in practice and the TAI is certainly the more prominent and active institute.

A.2.2 TAI

The TAI is the most preferred arbitration institute in Thailand. It was originally established in 1990 under the umbrella of the Ministry of Justice. It revised its arbitration rules in January 2017 with an aim to modernize its rules to an international standard. Moreover, the TAI was repositioned under the Office of the Judiciary, a constitutionally separate secretariat, in order to ensure the neutrality of the TAI in cases involving governmental agencies. The TAI Rules apply to all arbitrations organized by the TAI, except where the parties agree to use other rules with the consent of the Director of the Alternative Dispute Resolution office, a section within the Office of the Judiciary that administers the TAI. Similarly to the UNCITRAL Rules, neither the Act nor the TAI Rules contain detailed procedural requirements, providing the tribunal with broad discretion in deciding how to proceed. In addition, neither the Act nor the TAI Rules empower a tribunal to order interim measures of protection, which must instead be sought from the Thai court of competent jurisdiction. Under Thai law, the right to recover actual attorney's fees and expenses is generally not recognized. This custom is embedded in the TAI Rules,

which allow the tribunal to award costs and expenses as well as arbitrator's fees, but not attorney's fees and expenses. Consequently, parties wishing to recover legal fees must include an express provision in the arbitration agreement allowing their recovery.

A.2.3 THAC

The THAC was established in 2015, pursuant to the Arbitration Institute Act (2007), in order to support and promote international arbitration, with the aim of providing an arbitration center with modern facilities in Thailand that meets international standards and can serve as the center of arbitration in the ASEAN countries. The THAC has its own set of arbitration rules, modelled on the 2013 SIAC Arbitration Rules.

B. Cases

As the vast majority of arbitration cases remain confidential and the primary bodies administrating arbitrations in Thailand do not publish case records, cases generally only become a matter of public record when their enforcement is challenged in Thai courts.

B.1 Challenging the appointment of arbitrators

In Supreme Court Case No. 15010/2558 (2015), the court considered a claimant's challenge of the arbitrator appointed by the respondent, which was lodged before the claimant had appointed its own arbitrator and before the two party-appointed arbitrators had appointed a chairman. The Act requires that, unless the parties agree otherwise, an arbitrator challenge be initially lodged with the arbitral tribunal after the tribunal has been formed. Since the tribunal had not yet been formed, the court found that the claimant's challenge made directly to the court was procedurally inadmissible, and dismissed the case.

B.2 Enforcement of arbitral awards

Supreme Administrative Court Case No. Or. 487/2557 (2014) involved disputes arising from a public concession for wastewater treatment between a joint venture of six private entities (the

claimants), and the Pollution Control Department (the respondent). The claimants filed an arbitration claim against the respondent on the grounds of breach of concession, as the respondent had failed to remit payment for the claimants' construction work. The tribunal rendered an award in favor of the claimants, obligating the respondent to pay outstanding fees, plus damages and interest, and to return the claimants' performance bank guarantee.

Upon receiving copies of the ruling, the claimants filed a motion pursuant to Section 39 of the Act, requesting that the tribunal correct an error in the award by amending the wording from "the respondent shall pay the fee of Baht 6,000,000 to the claimants" to "the respondent shall pay the fee of Baht 6,000,000 *per annum* to the claimants." The tribunal implemented the requested correction.

The respondent refused to comply with the award. Subsequently, the claimants filed a motion to enforce the award with the Central Administrative Court. Meanwhile, the respondent filed a motion to set aside the arbitral award. The respondent argued that the tribunal's correction to the award was outside the scope of Section 39 of the Act, as it constituted a significant change that increased the respondent's burden. It further claimed that the enforcement of the award would be contrary to the public policy of Thailand, since the composition of the arbitral tribunal was not in accordance with the Act, which provides that the parties' appointed arbitrator may be appointed by an order of the competent court. The respondent claimed that during the formation of the three-arbitrator tribunal, the respondent had not appointed its arbitrator within the given time frame. As a result, the claimants obtained an order from the Civil Court appointing an arbitrator for the respondent. However, since these disputes had arisen from a concession agreement, they were regarded as administrative, and therefore subject to the jurisdiction of the Administrative Court, not the Civil Court. In addition, the respondent claimed that the award did not clearly state why the respondent had to be liable to the claimants for each item of damage. Therefore, the award was contrary to

paragraph 2 of Section 37 of the Act, which provides that the tribunal must clearly state the reasons for granting its award.

The Central Administrative Court ruled that there was no valid cause to set aside the award under Section 40 of the Act. The respondent appealed the ruling, but the decision was upheld by the Supreme Administrative Court, which reasoned that, in correcting the award, the tribunal had lawfully made minor corrections of insignificant errors, pursuant to Section 39 of the Act. The respondent was entitled to invoke Section 10 of the Act Governing Decisions of Power and Duty Between the Courts to object to the Civil Court's jurisdiction in appointing an arbitrator for the respondent, but it had chosen to waive such right. Therefore, the Civil Court's decision was deemed lawful and final under Section 18 of the Act. Even though the claimants later filed for enforcement of the award with the Central Administrative Court, the Civil Court's appointment of arbitrator was not affected, and therefore the tribunal was still empowered to consider and rule on the dispute. Hence, the Supreme Administrative Court viewed that the enforcement of the award would not be contrary to public policy or good morals under Section 40(2)(b) of the Act. With respect to the claim that the tribunal did not clearly mention the reasons for its decision, the Supreme Administrative Court ruled that the award had already set out that the respondent was obligated to pay the construction fee to the claimants as agreed, in the relevant installments, upon the claimants' completion of work. Therefore, the award was made in full compliance with paragraph 2 of Section 37 of the Act.

B.3 Status of judgment of the Court of First Instance in arbitral proceedings

In the matter considered in Supreme Court Case No. 10057/2555 (2012), the insurer (the claimant), filed an arbitration case against the reinsurer (the respondent), seeking compensation under a reinsurance contract. The underlying contract provided that any disputes were to be resolved by an arbitral tribunal in accordance with Thai law and the

principle of *ex aequo et bono*, and must take into account all agreements between the parties.

During the presentation of evidence in the arbitration proceedings, the respondent made its claim based on a judgment of a court of first instance. The tribunal admitted this claim and rendered an award in favor of the respondent based partially on the legal principles applied by the court of first instance in its judgment. Subsequently, the respondent filed a motion for enforcement of the award and the claimant filed a motion to challenge the award under Section 40(5) of the Act, which provides that the court may refuse enforcement of an arbitral award if the person against whom the award will be enforced furnishes proof that the arbitral proceedings were not conducted in accordance with the agreement of the parties.

The court found that the reinsurance agreement did not clearly provide that the tribunal must decide disputes in accordance with relevant final court judgments. It also observed that Section 146 of the Civil Procedure Code of Thailand provides that when deciding the same legal issue, the judgment of a higher court carries more weight than that of a lower court. Hence, considering that the decision of the court of first instance in this case could be overturned by a higher court in the future, the tribunal had no legal authority to rely on the court judgment. Therefore, the fact that the tribunal had based its ruling on the court judgment was contrary to the parties' agreement under Section 40(5) of the Act. As a consequence, the court issued an order to refuse enforcement of the arbitral award.

B.4 Granting arbitration awards under an investment treaty

In 2005, the German company, Walter Bau AG (in liquidation), filed for arbitration against Thailand under the UNCITRAL Arbitration Rules based on the BIT between Germany and Thailand of 24 June 2002, as well as its 1961 predecessor. The arbitration involved a dispute relating to the construction of the Don Muang Tollway (DMT) between Bangkok and Don Muang Airport. The claimant had a minority stake in the consortium, which contracted to construct,

operate and transfer the toll operation. The claimant argued that the Thai government had violated the BIT, claiming expropriation and a violation of fair and equitable treatment. The claimant asserted that the Thai government had decided to reduce tolls charged to drivers despite the claimant's objections, and had made improvements to the free road networks around the toll road, which were beyond mere "traffic management" allowed under the concession contract. As a result, the claimant suffered losses. In addition, the claimant asserted that construction invoices remained unpaid by the Thai government.

In its 1 July 2009 award, the tribunal rejected the claimant's assertion that its disputes with Thailand prior to the effective date of the 2002 BIT should be covered by the 1961 predecessor, as the prior treaty lacked an investor-state arbitration clause. The tribunal likewise rejected the claimant's claim of "creeping expropriation" on the grounds that none of Thailand's actions reached the level of "creeping expropriation" as defined in *PSEG Global v. Turkey* (ICSID ARB/02/5, 19 January 2007), namely: a form of depriving the investor of control of the investment or management of the day-to-day operations of the company; interference in the administration; impeding the distribution of dividends; interference with the appointment of officials and managers; or otherwise depriving the company of its property or control, in total or in part.

The tribunal did find, however, that the Thai government had breached the fair and equitable treatment provision under the 2002 BIT by violating the claimant's legitimate expectations. Specifically, the tribunal found: that the claimant had a legitimate expectation to a reasonable return on its investment, considering that the concession was semi-public, and thus, heavily regulated; that investors would not contemplate such a long-term investment without a legitimate expectation of a reasonable return on their investment; and that the tolls received were the only way such a return could be achieved. Although the consortium was not entitled to raise tolls without permission, the tribunal found that the Thai government was not entitled to ignore the reasonable requests of the consortium to raise

tolls and that the Thai government had delayed and continuously refused the consortium's request to raise tolls for over a decade. In rendering damages, the tribunal applied a discounted cash flow analysis to the claimant's claim for lost profits and awarded EUR 29.2 million and costs of EUR 1.8 million.

C. Trends and observations

Arbitration remains a prevalent dispute resolution choice between contracting parties, with the TAI reporting an annual average of 130 new cases, 112 resolved cases and 315 pending cases at year's end, worth over USD 1.2 billion, from 2005 to 2014. Notable issues relating to the field of arbitration are examined below.

C.1 Validity of agreements between government agencies and private parties

Under the Act, an agreement between governmental agencies and private parties, regardless of whether the agreement is an administrative contract, may be resolved by arbitration, and any such arbitration agreement is binding upon the parties. Case precedent establishes that an award under an administrative contract between governmental agencies and private parties is subject to the jurisdiction of the Administrative Court. However, the Administrative Court is not empowered to review the merits of an arbitration award. Arbitration between governmental entities and private parties is a subject of considerable controversy in Thailand, as several arbitration awards have been granted against the Thai government, and the Thai government has gone to some lengths to avoid enforcement of these awards. To address this situation, on 27 January 2004, a Thai cabinet resolution was passed, stipulating that any "concession agreements," which Thai administrative agencies conclude with Thai or foreign private parties in administrative contracts, must not include binding arbitration agreements unless approved by the Thai cabinet. On 28 July 2009, a new Thai cabinet resolution was issued with reference to that of 27 January 2004, broadening the restriction by stipulating that any agreements concluded between Thai administrative agencies and

Thai or foreign private parties, regardless of whether they are administrative contracts, cannot include binding agreements to resolve disputes by arbitration, unless approved by the Thai Cabinet. These restrictions have rightfully caused foreign investors to be wary of contracting with Thai governmental agencies. In practice, however, the Thai cabinet will consider contracts containing arbitration agreements on a case-by-case basis.

C.2 Costs in international arbitration

C.2.1 Allocation of costs

Sections 46 and 47 of the Act provide the legal basis for the treatment of fees, expenses and remuneration in arbitration proceedings conducted in Thailand. Pursuant to Section 47 of the Act, an arbitration institute is entitled to prescribe fees, expenses and remuneration incidental to arbitral proceedings. Pursuant to Section 46, unless the parties agree otherwise, the fees and expenses incidental to the arbitral proceedings and the remuneration for arbitrators, excluding attorney's fees and expenses, are to be as stipulated in the award of the arbitral tribunal.

In the event the fees, expenses or remuneration have not been fixed in an award, any party or the arbitral tribunal may petition a competent court for a ruling on the arbitration fees, expenses and remuneration for the arbitrator as it deems appropriate.

Costs do not always "follow the event," and tribunals exercise discretion when allocating costs. However, customarily, the winning party will be awarded the costs it has incurred. Where the winning party has only partially won its case, the tribunal may award costs on a pro rata basis.

It is noteworthy that an arbitral tribunal is not entitled under the Act to award attorney's fees, unless otherwise agreed by the parties. Even where the parties do have in place such an agreement, the rules of the relevant arbitration institute may speak to this issue. For instance, the Arbitration Rules of the TAI do not permit an arbitral tribunal to

award attorney's fees and expenses; conversely, Article 84 of the THAC Rules allow an arbitral tribunal to award attorney's fees and expenses.

C.2.2 Security for costs

Under Section 16 of the Act, a party may submit a motion requesting the court to issue an order imposing an interim measure to protect a party's interest, before or during the arbitration process. If the court decides that, had such proceedings been conducted in court, the court would have been able to issue the order, the court may grant the request. If the order for an interim measure is issued by the court, the party filing the motion must start the arbitral proceedings within 30 days from the date of the court order or within the period of time designated by the court, failing which the court order is deemed to be cancelled.

Pursuant to Section 253 of the Thai Civil Procedure Code, if a plaintiff is not domiciled or his or her business office is not situated in Thailand and the plaintiff does not have property liable to execution within Thailand, or there is strong reason to believe that the plaintiff will evade the payment of cost and expenses if they lose the case, the defendant may, at any time before judgment, apply to the Court for an order directing the plaintiff to deposit money as security for the payment of costs and expenses for which the plaintiff will be liable if they lose the case. This rule is also applicable at the appellate stages.

Taking Section 16 of the Act in conjunction with Section 253 of the Thai Civil Procedure Code, in certain circumstances, a respondent may request the court to issue an order requiring the claimant to provide security for costs at the outset of, or during, an arbitral proceeding.

C.2.3 Recovery of costs

As described in C.1, unless otherwise agreed by the parties, there are restrictions on an arbitral tribunal's right to award attorney's fees and expenses under the Act. Aside from attorney's fees and expenses, the

tribunal will apportion costs (such as administrative secretariat fees and fees to subpoena witnesses, audio recordings and transcripts) and the arbitrator's fees between the parties, in the tribunal's sole discretion. The arbitral tribunal also has discretion to award other forms of costs, such as witnesses' travelling expenses. Parties seeking recovery of costs are expected to furnish evidence of those costs, such as invoices and receipts.